SII HING KUNG & ANOR

v.

DAVID T.M. TING

HIGH COURT, SIBU
TUAN STEVE SHIM LIP KIONG JC
[CIVIL SUIT NO. 94 OF 1986]
12 JUNE 1992

PRACTICE AND PROCEDURE: Want of prosecution - Application by defendant to dismiss the plaintiff's action for want of prosecution - Intentional and contumelious default - Inordinate and inexcusable delay on the part of plaintiffs or their Advocates to prosecute action - Whether such delay will give rise to substantial risk that it is not possible to have a fair trial - Prejudicial to defendants.

This was an application by the defendant to dismiss the plaintiffs' action for want of prosecution on the grounds that:

(1) that there has been intentional and contumelious default on the part of the plaintiffs or the advocates and, or

(2) that there has been inordinate and inexcusable delay on the part of the plaintiffs or their advocates to prosecute this action and such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in this action or is such as is likely to cause or to have caused serious prejudice to the defendant. The plaintiffs' claim against the defendant was for damages for professional negligence allegedly committed during the period between 31 January 1985 to 7 February 1985.

Held:

[1] On the evidence, circumstances and the reasons given, the defendant has succeeded in establishing that there has been inordinate and inexcusable delay on the part of the plaintiffs' solicitors. As a result, such delay will give rise to a substantial risk where it is not possible to have a fair trial of the issues in the action or is such as is likely to cause serious prejudice to the defendant as between the defendant and the plaintiffs.

[Plaintiffs' action dismissed with costs for want of prosecution].

Cases referred to:
Allen v. Sir Alfred McAlpine & Sons Ltd. [1968] QB 229 at p. 268 ***(foll)***
Datuk Samy Vellu v. Karpal Singh [1989] 3 MLJ 493 ***(refd)***

For the plaintiffs - H C Sim
For the defendant - Robin Hii

JUDGMENT

Steve Shim Lip Kiong JC:
This is an application by the defendant for an order that the plaintiffs' action be dismissed for want of prosecution on the following grounds, namely,

(1) that there has been intentional and contumelious default on the part of the plaintiffs or their advocates and or

(2) that there has been inordinate and inexcusable delay on the part of the plaintiffs or their advocates to prosecute this action and such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in this action or is such as is likely to cause or to have caused serious prejudice to the defendant. It is supported by the affidavits of the defendant sworn by him on 19 February 1992 and 5 May 1992 respectively. The application is resisted by the plaintiffs whose solicitors Messrs. Reddi & Co. have filed the relevant affidavits sworn by Mr. George Lim, Mr. William Lau Kung Hui and Mr. H.C. Sim respectively on 2 May 1992.

The action, to which this application has relevance, relates to the plaintiffs' claim against the defendant for damages for professional negligence allegedly committed in the period between 31 January 1985 and 7 February 1985. The plaintiffs are claiming the amount of RM124,817.40 as well as interest and costs. To appreciate the position more fully, it is perhaps appropriate to list out the sequence of events leading to the application, namely, that on 27 May 1986 a writ of summons was issued and served on the defendant on 28 May 1986; that on 6 June 1986, the defendant entered appearance through his solicitors, Messrs. Anthony Liew Advocates; that on 18 July 1986, the relevant defence was filed and served on the plaintiffs' solicitors on 19 July 1986; that on 6 February 1987, the plaintiffs' solicitors served their reply on Messrs. Anthony Liew Advocates; that on 2 March 1987, the plaintiffs' solicitors took out summons for directions and served it on the defendant's solicitors on 12 March 1987; that hearing of the summons for directions was fixed for 4 May 1987 but it was adjourned by the Court to enable the parties to file their respective lists of documents; that on 13 July 1987, the summons was adjourned further to 24 August 1987 pending the outcome of notice to admit facts; that on 20 August 1987, the defendant's solicitors filed a summons in chambers for leave to serve interrogatories on the plaintiffs to be heard on 21 September 1987; that on 24 August 1987, the summons for directions was further adjourned by the Court; that the hearing of the summons in chambers for leave to serve interrogatories was adjourned a number of times but finally on 24 March 1988, the Court made the order granting leave; that on 22 April 1988, the defendant's solicitors served the said order on the plaintiffs' solicitors; that on 3 May 1988, the plaintiffs' solicitors; served on the defendant's solicitors an answer to the interrogatory; that on 21 January 1992, the plaintiffs' solicitors wrote to the Senior Assistant Registrar, requesting a date to be fixed for the resumed hearing of the summons for directions; that on 19 February 1992, the defendant, through his solicitors, took up the application to strike out the plaintiffs' action for want of prosecution.

In order to appreciate the merits of this application, it is, I think, pertinent to examine what had actually transpired on 24 August 1987 because that seems to be so central to the essential arguments raised by the parties involved. The record of proceeding is reflected in **exhibit T6** annexed to the supplementary affidavit of the defendant and it states as follows:

> Mr. George Lim for M/s. Reddi & Co. acting for plaintiffs.
>
> Mr. Stephen Chung for Anthony Liew acting for defendant.
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> Mr. Chung: Ask for adjournment because defendant Counsel has filed applications for leave to serve interrogatories.
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> Mr. Lim: Agree.
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> Court: Summons adjourned to a date to be fixed on application by plaintiffs.
>
> (Sgd) Chong Siew Fai,
> Judge.
> 24 August 1987

In view of the above, it is therefore difficult to accept the joint position taken by Mr. H.C. Sim, Mr. William Lau and Mr. George Lim in their affidavits that the summons for directions was in fact adjourned to a date to be fixed by the Court and nothing more. That is obviously erroneous. According to Mr. George Lim, there was no order requiring the plaintiffs to apply for the date of hearing the summons for directions; that to his knowledge and understanding, the said summons was to be merely adjourned to a date to be fixed by the Court. However, Mr. Stephen Chung, acting on behalf of Messrs. Anthony Liew Advocates for the defendant, was able to understand perfectly the terms of the order. This is reflected in his letter dated 27 August 1987 **exhibit T2** addressed to Messrs. Anthony Liew Advocates, the relevant part of which states:

> Mr. Justice Chong has adjourned the summons for directions to a date to be fixed on application by the plaintiffs pending the hearing and outcome of your application for leave.

If Mr. Stephen Chung was able to absorb the decision of the learned Judge correctly, how then is it possible that Mr. George Lim could have failed to do likewise as he was also there at the material time. Now, I would not go so far as to suggest that Mr. Lim had deliberately twisted or discoloured the order of the Court because the circumstances could also give rise to the possibility that he was perhaps not paying as much attention as he should have done and so might have conceivably misunderstood the said order. That, I think, is the position adopted by Mr. H.C. Sim before me, apparently after having sight of the contents of the actual decision of the learned Judge as reflected in **exhibit T6** aforesaid. In the circumstances, I am quite prepared to accept that Mr. George Lim had misunderstood the order made on 24 August 1987. In that respect, he would therefore have been negligent. It should be noted that the proceeding of 24 August 1987 was a very brief one and hence there could be no plausible reason, short of being deaf and sick, for his failure to concentrate fully on the matter.

In view of the conclusion I have taken that Mr. George Lim might have misunderstood the Court Order on 24 August 1987, the question of whether there has been intentional and contumelious default on the part of the plaintiffs and or their solicitors, does not really arise for consideration. The more pertinent question must therefore be focussed on whether, as a result of the negligence of Mr. George Lim, there is an inordinate and inexcusable delay, giving rise to a substantial risk that it is not possible to have a fair trial of the issues in this action or is such as is likely to cause or to have caused serious prejudice to the defendant.

What is the position in law in relation to an application to dismiss an action for want of prosecution on the ground of inordinate and inexcusable delay? Here, I shall adopt the test taken by Salmon LJ in *Allen v. Sir Alfred McAlpine & Sons Ltd.* [1968] QB 229 at p. 268 wherein he said *inter alia:*

> In order for such an application to succeed, the defendants must show
>
> (1) that there has been inordinate delay. It would be highly undesirable and indeed impossible to attempt to lay down a tariff, so many years or more on one side of the line and a lesser period on the other. What is or is not inordinate delay must depend upon the facts of each particular case. These vary infinitely from case to case, but inordinate delay should not be too difficult to recognise when it occurs.
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> (2) that this inordinate delay is inexcusable. As a rule, until a credible excuse is made out, the natural inference would be that it is inexcusable.
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> (3) that the defendants are likely to be seriously prejudiced by the delay. This may be prejudice at the trial of the issue between themselves and the plaintiff or between each other or between themselves and the third parties. In addition to any inference that may properly be drawn from the delay itself, prejudice can sometimes be directly proved. As a rule, the longer the delay, the greater the likelihood of serious prejudice at the trial.

Now, Mr. H.C. Sim has submitted that there was no inordinate delay because the plaintiffs and or their solicitors were at all material times waiting for the Court to fix the date of the hearing of the summons for directions. I do not think this proposition holds much water given his own admission that Mr. George Lim who was then representing Messrs. Reddi & Co. for the plaintiffs, had somehow misunderstood the actual order of the Court and was therefore negligent in that respect. It has also

been canvassed that the said order is to be construed as allowing the plaintiffs and or their solicitors a free choice of when to apply for the hearing of the said summons. With respect, I am unable to accept this. In my view, the real purpose of the application to adjourn is reasonably clear, namely, to sort out the matter relating to the defendant's application for leave to serve interrogatories on the plaintiffs then pending before the Court. It follows therefore that the application to be made by the plaintiffs and or their solicitors for hearing the summons for directions, had to be made after the matter of the interrogatories was completed. I accept the view that there is nothing in the said order of the Court on 24 August 1987 requiring the plaintiffs and or their solicitors to apply immediately after the completion of the interrogatories but I think it is fair and proper to construe it to mean that the plaintiffs and or their solicitors had to make the necessary application within a reasonable time. To construe it otherwise as allowing them freedom to apply ***ad infinitum*** is to sanction an abuse of the process of the Court.

What is a reasonable time must of course depend on the facts of the particular case. Here, the matter relating to the interrogatories would have been completed in May 1988. The plaintiffs and or their solicitors waited until January 1992 to apply for the hearing of the summons for directions. There is a lapse of about 43 months. Such a delay must be considered excessive in the circumstances. I do not think the change of the defendant's solicitors and or his intended migration to New Zealand etc., can be regarded as sufficient reason to delay the application on the part of the plaintiffs' solicitors. Evidently, they had knowledge of the defendant's or his solicitors' address for service. Thus, whether or not the defendant and or his solicitors had ceased operations, would have been quite immaterial so long as there was in existence, as in this case, a proper address for service of documents on the record. It should be noted that there is no clear evidence, on the affidavits, as to the exact terms of the communication made by Mr. George Lim to Messrs. Reddi & Co. pertaining to the Court order dated 24 August 1987. Nevertheless, paragraph 4 of Mr. George Lim's affidavit seems to suggest that he had conveyed to Messrs. Reddi & Co. what he perceived to be the decision of the Court. Apparently, Messrs. Reddi & Co. did not make any attempt to check on the accuracy of the Court order in question. It is perhaps quite understandable for them to have placed their confidence on the capability of Mr. George Lim, a fellow practitioner. Nevertheless, it would be foolhardy bordering on negligence to discount completely the possibility of a Court order being misunderstood by one or other or both of the parties involved. Hence, the necessity to recheck by requesting the Court for a copy of the Court's decision or order. Unfortunately, there is nothing to indicate or suggest that Messrs. Reddi & Co. had made any attempt to request for a copy of the Court order nor have they given any explanation on this score. In this context and to that extent, they would have been negligent. On the evidence and for the reasons given, I am of the view and I hold that there was inordinate and inexcusable delay on the part of the plaintiffs' solicitors.

The next pertinent issue is to consider whether the defendant is likely to be seriously prejudiced by the delay. More specifically, whether the delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendant as between him and the plaintiffs.

In this case, the cause of action is alleged to have arisen in early 1985. Up to the date when the plaintiffs' solicitors requested for the resumed hearing of the summons for directions *vide* letter dated 21 January 1992 **exhibit SHC-1**, about 7 years have lapsed. The defendant was and still is a practising lawyer by profession. The plaintiffs have sued him for damages for professional negligence. In his affidavit, the defendant has stated that the action had a very adverse psychological effect on him which worsened with the long delay; that in effect, he had suffered mental anguish in having the action hanging over his head for such a considerable length of time. His Counsel Mr. Robin Hii had invoked that passage by Lord Denning in *Allen, supra,* wherein he said *inter alia:*

> It is, I think, a grave injustice to professional men to have a charge of this kind outstanding for so long. It is impossible to have a fair trial after all this time.

Mr. Sim for the plaintiffs, has contended that this case would not have come up for trial even if the summons for directions had been heard much earlier since some older cases have yet to be tried. It is, I think, unfair if not misconceived, to make comparisons purely on the basis of the various dates registered or set down by the Court. There might well have been other but totally rational reasons why the older cases have not yet come up for trial. I am not prepared to speculate. In any event, knowledge of such an eventuality should have alerted the plaintiffs and or their solicitors of the necessity to take urgent action to prosecute the case. Was it not Lim Beng Choon J. in *Datuk Samy Vellu v. Karpal Singh* [1989] 3 MLJ 493 who said *inter alia:*

> This action is unlikely to come up for hearing for perhaps another year ... The psychological effect caused by this suit hanging over his head for such a long period will surely cause or have caused prejudice to the defendant ... why should this suit be allowed to hang over his head for another year or more? ... On this ground alone, this action should be dismissed.

The defendant has alleged in his affidavit of 19 February 1992 that with the passage of time, his memory and those of his witnesses, in so far as oral evidence is concerned, will have been adversely effected. In an attempt to rebut this, Mr. Sim has submitted that the issues in dispute as reflected in the statement of claim, the defence and the reply, are confined essentially, if not solely, to documents. He then proceeds to analyse the issues raised in the defence in some detail in order to show that they could be determined substantially on the basis of documentary evidence. However, it should be noted that although the issues in dispute related to various documents and so the nature and effect of those documents could be established essentially by documentary evidence, still, oral evidence would have to be led to establish the circumstances under which the documents came about. It would certainly be an advantage to know and understand something of their background. Apparently, there were oral communications between the parties. Evidence would have to be led on the *voir dire* on this score. Since the cause of action is alleged to have occurred about 7 years ago, I am inclined to agree that the memories of the defendant and his witnesses and their ability to recollect the material events, would have been adversely affected by the long delay.

In summary therefore, on the evidence, circumstances and for the reasons given, I have come to the conclusion that the defendant has succeeded in establishing that there has been inordinate and inexcusable delay on the part of the plaintiffs' solicitors and that such delay will give rise to a substantial risk where it is not possible to have a fair trial of the issues in the action or is such as is likely to cause serious prejudice to the defendant as between him and the plaintiffs. Accordingly, the defendant has succeeded in this application. I therefore dismiss the plaintiffs' action against the defendant. Costs to the defendant to be taxed.